IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUSAN L. SACAVAGE	:	CIVIL ACTION
v.	:	
JEFFERSON UNIVERSITY PHYSICIANS	:	NO. 99-3870

MEMORANDUM AND ORDER

BECHTLE, J. JUNE , 2000

Presently before the court is defendant Jefferson University Physicians' ("Defendant") motion for summary judgment and plaintiff Susan L. Sacavage's ("Plaintiff") response thereto. For the reasons set forth below, the motion will be granted.

I. BACKGROUND

Plaintiff brought this action against Defendant, alleging that her employment was terminated based on her pregnancy in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) et seq..[1] Defendant hired Plaintiff to work as a Medical Records Clerk in the fall of 1997.[2] Plaintiff was absent from work on December 10, 1997; January 2, 1998; January 14, 1998; January 15, 1998; January 16, 1998; and January 23, 1998.

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[1] In 1978, Congress amended Title VII of the Civil Rights Act of 1964 to prohibit discrimination on account of pregnancy: "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k).

[2] Defendant asserts that Plaintiff was hired on November 10, 1997. (Def.'s Mot. for Summ. J. Ex. A & C.). Plaintiff's Amended Complaint, however, states that "Plaintiff began her employment on October 11, 1997." (Am. Compl. ¶ 4).

(Def.'s Mot. for Summ. J. Ex. C ¶ 9.) Plaintiff was warned about her absences and received three days without pay on January 14, 15 and 16, 1998, for her failure to report to work or call and get approval for her absences. Id. ¶ 10. Plaintiff was also counseled regarding her productivity at work due to her tendency to socialize and take personal phone calls during work hours. Id.; Sacavage Dep. at 89-90 & 179.

In February 1998, Plaintiff told her supervisor, Constance Brennan, that she was pregnant. (Def.'s Mot. for Summ. J. Ex. C ¶ 11.) On March 16, 1998, Plaintiff did not report to work. Plaintiff did not attend work between March 16, 1998 and March 26, 1998. On March 25, 1998, Brennan sent Plaintiff a letter stating that because Plaintiff failed to report to work on March 24 and March 25 and had not reported her absences, her employment was terminated. (Pl.'s Br. in Opp'n to Def.'s Mot. for Summ. J. Ex. D.) Plaintiff alleges that her employment was terminated not because of Defendant's attendance policy but because she was pregnant. Plaintiff filed her Complaint on July 30, 1999.[3] On January 13, 2000, Defendant filed a motion for summary judgment. On February 1, 2000, Plaintiff filed a brief in opposition to Defendant's motion for summary judgment, to which Defendant filed a reply on February 10, 2000.[4]

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[3] Plaintiff filed an Amended Complaint on January 31, 2000, changing only the caption to read "Jefferson University Physicians" rather than "Thomas Jefferson University Hospital."

[4] The court has jurisdiction over Plaintiff's claims because they arise under federal law. 28 U.S.C. § 1331.

II. LEGAL STANDARD

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute is material only if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Whether a genuine issue of material fact is presented will be determined by asking if "a reasonable jury could return a verdict for the non-moving party." Id. In considering a motion for summary judgment, "[i]nferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992) (citation omitted).

III. DISCUSSION

Defendant contends that Plaintiff has presented no evidence that her discharge constituted disparate treatment. Defendant asserts that there is neither evidence of an anti-pregnancy bias nor evidence that other non-pregnant employees were treated more favorably than Plaintiff.

To prove discrimination, plaintiff "must show that she was treated less favorably than a nonpregnant employee under identical circumstances and that her pregnancy was the reason she was treated less favorably." Piraino v. Int'l Orientation Resources, Inc., 137 F.3d 987, 990 (7th Cir. 1998) (citations and internal quotations omitted). Thus, Plaintiff must show that Defendant treated similarly situated nonpregnant employees "more favorably." Hunt-Golliday v. Metropolitan Water Reclamation Dist., 104 F.3d 1004, 1011 (7th Cir. 1997).

In a case alleging disparate treatment under Title VII, the plaintiff carries the initial burden of demonstrating the existence of a prima facie case. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). To establish a prima facie case of pregnancy discrimination, the employee must demonstrate that, at the time in question, she was pregnant, that she was performing her job satisfactorily, that she was terminated, and that there is a nexus between her pregnancy and the adverse employment decision. Siko v. Kassab, Archbold & O'Brien, LLP, No.CIV.A.98-402, 1998 WL 464900, at *2 (E.D. Pa. Aug. 5, 1998) (citing Boyd v. Harding Academy of Memphis, Inc., 88 F.3d 410, 413 (6th Cir. 1996) and Quaratino v. Tiffany & Co., 71 F.3d 58, 64 (2d Cir. 1995)). If plaintiff succeeds, the burden of production shifts to the defendant to "articulate some legitimate, nondiscriminatory reason for the non-consideration." McDonnell Douglas, 411 U.S. at 802; see Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253-56 (1981) (describing

burden shift); St. Mary's Honor Center v. Hicks, 509 U.S. 499, 506-09 (1993) (same). Once an employer has demonstrated a legitimate reason for the employment action, the presumption of discrimination raised by the prima facie case is rebutted. Hicks, 113 S. Ct. at 2747. Plaintiff "must satisfy [her] ultimate burden of proving, by a preponderance of the evidence, that the defendant's proffered reason is not the 'true reason' for the decision, but instead is merely a pretext" for discrimination. Ryder v. Westinghouse Elec. Corp., 128 F.3d 128, 136 (3d Cir. 1997) (citing Hicks, 509 U.S. at 511). In Hicks, the Court stated that a plaintiff-employee must prove by a preponderance of the evidence that the legitimate reasons proffered by the defendant-employer were not its "true" reasons, but were a pretext for discrimination. Hicks, 509 U.S. at 507-08. The Court went on to state that "a reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false and that discrimination was the real reason." Id. at 516. Hicks cautioned that "it is not enough . . . to disbelieve the employer; the fact-finder must believe the plaintiff's explanation of intentional discrimination." Id. at 520.

In the instant case, Plaintiff has asserted that she was pregnant at the time her employment was terminated, and that she was replaced by someone who was not pregnant. Plaintiff asserts that Defendant deliberately fired her because of her pregnancy. (Compl. ¶¶ 12 & 14.) Defendant has offered a nondiscriminatory

reason for terminating Plaintiff, by contending that she was fired because of her failure to report to work or call her supervisor to explain her absence. Thus, Plaintiff must demonstrate the existence of evidence that would allow a jury to find that Defendant's proffered reason is pretextual and that the real reason for Defendant's action was intentional discrimination. Boyd, 88 F.3d at 413 (stating that if employer articulates legitimate, nondiscriminatory reason for its actions in pregnancy discrimination suit, employee must prove by preponderance that defendant intentionally discriminated against her); Barone v. Gardner Asphalt Corp., 955 F. Supp. 337, 345 (D.N.J. 1997) (dismissing claim of age discrimination and stating that "once [Defendant] articulates a legitimate and nondiscriminatory reason for the termination, the burden shifts back to [Plaintiff] not only to rebut [Defendant's] evidence but also to adduce evidence which shows that discrimination was more likely than not to have been a motivating or determinative cause of his termination") (citations omitted).

Plaintiff asserts that an inference of discrimination may be made because she allegedly complied with Defendant's attendance policy, yet was fired for her failure to comply. The court notes that there is a factual dispute regarding Defendant's attendance policy and whether Plaintiff in fact complied with it. Under the caption "Policy Summary," Defendant's policy states that "[a]n employee must personally report absences on a daily basis to his/her supervisor or the supervisor's designated

representative." (Pl.'s Br. in Opp'n to Def.'s Mot. for Summ. J. Ex. G.) Under the caption "Reporting Absences," the policy states that "[e]mployees must personally report absences on a daily basis to the supervisor, supervisor's designee, or recording system." Id. This section adds that "[i]n the event an employee fails to report off at all for two successive shifts, he/she will be subject to immediate discharge." Id. Plaintiff contends that she complied with the policy by speaking to her supervisor personally on March 16, 1998, leaving several messages on her supervisor's answering machine and calling in daily, speaking to several co-workers.[5] (Sacavage Dep. at 81, 85 & 94; Pl.'s Br. in Opp'n to Def.'s Mot. for Summ. J. Ex. H.)

Defendant asserts that Plaintiff's supervisor required her employees to personally speak to her on a daily basis to report illnesses, and that each employee was given Brennan's work, home and cell phone numbers. (Def.'s Mem. of Law in Supp. of Mot. for Summ. J. Ex. C ¶ 7.) Plaintiff denies receiving a card with Brennan's phone numbers. However, Plaintiff acknowledges that Brennan required employees in her department "to call in every

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[5] Plaintiff's supervisor denies speaking with Plaintiff. Rather, Brennan contends that she received two voice mail messages from Plaintiff: a Tuesday, March 18, 1998 message stating that Plaintiff would return to work on Wednesday, March 19, 1998 and a Thursday, March 20, 1998 message stating that Plaintiff would not return until Tuesday, March 24, 1998. (Def.'s Mot. for Summ. J. Ex. C ¶¶ 20 & 23.) Brennan also asserts that she called Plaintiff's home on March 17, 1998 and March 19, 1998 in an effort to speak to Plaintiff regarding her absence, but was informed that Plaintiff could not come to the phone because she was sleeping. Id. ¶¶ 19 & 21.

day and speak to [her]." (Sacavage Dep. at 82.) When Plaintiff called to report her absence, she was informed by a co-worker that leaving a message with the co-worker "wasn't sufficient." (Sacavage Dep. at 82.) Plaintiff added that she "was told by [Brennan] that if you're out sick, if you're coming in late, [or] if something comes up," that she was to call Brennan. Id. at 116.

Assuming that Plaintiff called Defendant daily, speaking personally to her supervisor on one occasion and leaving messages on Defendant's answering machine, and yet was fired, the court nonetheless concludes that the foregoing is insufficient to create an inference of discriminatory intent based on Plaintiff's pregnancy. Viewing the evidence in the light most favorable to Plaintiff, the court is unable to infer either that other employees supervised by Brennan were treated differently, or that Plaintiff's pregnancy was the reason she was treated less favorably. Piraino, 137 F.3d at 990 (stating that plaintiff must show that she was treated less favorably than nonpregnant employee under identical circumstances, and that pregnancy was reason she was treated less favorably). The court notes that under Title VII, an employer is required to "ignore an employee's pregnancy, but not her absence from work, unless the employer overlooks the comparable absences of non-pregnant employees." Soreo-Yasher v. First Office Management, 926 F. Supp. 646, 649 (N.D. Ohio 1996) (citing Troupe v. May Dept. Store Co., 20 F.3d 734, 738 (7th Cir. 1994)). Here, there is neither evidence that

Plaintiff was treated differently than any nonpregnant employee who was similarly absent from work, nor that she was treated differently because of her pregnancy.

Plaintiff also alleges that an inference of discrimination may be made because Defendant made no effort to protect her from the dust and fumes caused by construction in her department. The record shows that in October 1997, Defendant began renovating the department to which Plaintiff was assigned. (Def.'s Mem. of Law in Supp. of Mot. for Summ. J. Ex. C.) Because of dust caused by the construction, Defendant swept and mopped the area daily, installed HEPA air filters in work areas and told employees who were bothered by the dust to take breaks as needed for fresh air, or bring their work to dust free areas at the other end of the hall. Id. Ex. C ¶¶ 14 & 15.

Plaintiff asserts that she presented Defendant with a note dated February 17, 1998 from her physician stating that Plaintiff experienced frequent nausea and "request[ed] that [Plaintiff] be placed in an area that she may not be able to smell fumes" for the duration of her pregnancy. (Pl.'s Br. in Opp'n to Def.'s Mot. for Summ. J. Ex. C.) Plaintiff asserts that rather than moving her to a different area to work, Defendant merely told her to take breaks for fresh air when she needed to. (Am. Compl. ¶ 8; Sacavage Dep. at 145.) Plaintiff asserts that she was treated unfavorably because when another employee, Dr. Anthony DiMarino's secretary, Jeanne DiMartino, experienced difficulties with dust, either Dr. DiMarino or his secretary purchased and installed a

HEPA filter near her. (Sacavage Dep. 129-31; Def.'s Reply Br. on Mot. for Summ. J. at 12.)

Defendant asserts that HEPA filters were installed throughout the medical records room and other work areas. (Def.'s Mem. of Law in Supp. of Mot. for Summ. J. Ex. C ¶ 14.) Plaintiff acknowledges that filters were "in a few places" but contends that, unlike Jeanne DiMartino, there was not one "right next" to her. (Sacavage Dep. at 130.)

It is clear that, under the statute, preferential treatment for pregnant employees is not required. Troupe, 20 F.3d at 738 (stating that "employers can treat pregnant women as badly as they treat non-pregnant employees"); Armstrong v. Flowers Hosp. Inc., 33 F.3d 1308, 1316-17 (11th Cir. 1994) (stating that hospital was not required to accommodate pregnant nurse's concerns regarding risk to herself and fetus posed by home health care treatment of patient with AIDS by rescheduling of nursing assignments). The record reveals that at least one other employee worked next to Plaintiff, in the same section of the building in which Plaintiff worked. (Sacavage Dep. at 49, 51, 59 & 73-74.) The record also shows that, like Plaintiff, all employees were told to take breaks for fresh air as needed. (Def.'s Mem. of Law in Supp. of Mot. for Summ. J. Ex. C ¶ 15.) Further, it is uncontested that DiMartino was not moved to a different area to accommodate her reaction to the dust. (Def.'s Reply Br. on Mot. for Summ. J. at 12-13; Sacavage Dep. at 131.) The court concludes that Plaintiff has not produced sufficient

evidence for a reasonable jury to conclude either that she was treated differently than other employees, or that she was treated differently because of her pregnancy.

Plaintiff also alleges that, in late February or early March, when she expressed concern about working near the construction, another supervisor stated that "if the baby is born with two heads, I'll make sure she has front page coverage." (Sacavage Dep. at 49-50.) Assuming that this statement was made, the court finds that, although it was insensitive, it is inadequate to show discrimination based on pregnancy. See Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 358-59 (3d Cir. 1999) (stating that supervisor's remark, made outside context of employment decision, that women are "unreliable employees because they get pregnant and get breast cancer" is insufficient, without more, to support plaintiff's claim in sex discrimination case); Kennedy v. Schoenberg, Fisher & Newman, Ltd., 140 F.3d 716, 723 (7th Cir. 1998) (stating that "isolated comments must be contemporaneous with the discharge or causally related to the discharge decision making process").[6]

Finally, Plaintiff asserts that her supervisors asked her several times how long she would be out for maternity leave and that she responded "most likely six weeks, maybe eight."

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[6] Likewise, Plaintiff's assertion that another co-worker, Lisa Ozimkiewicz, told Plaintiff of Dr. DiMarino's alleged desire to replace Plaintiff is not connected in any way to Plaintiff's pregnancy. Ozimkiewicz denies that any such conversation occurred. (Ozimkiewicz Aff. ¶ 6.)

(Sacavage Dep. at 75.) Plaintiff states that the first time she was asked about maternity leave, "there wasn't really any response" when she stated that she would take either six or eight weeks leave. Id. at 153. Plaintiff states that the next time she was asked and responded that she would be out for six to eight weeks, her supervisor "just kind of walked away." Id. at 153-54. Plaintiff also contends that her supervisors had ordered a cart for general use by medical records clerks to transport files. (Sacavage Dep. at 124-25 & 147.) After Plaintiff learned that she was pregnant, she asked Brennan when the cart would arrive. Id. at 125. Plaintiff acknowledges that Brennan called several times in an effort to the secure the cart, but contends that it did not arrive during the time that she worked for Defendant. Id. at 154-55. Based on the foregoing, Plaintiff makes the assertion that her supervisors "seem[ed] aggravated" by her and by the requests she made because of her pregnancy, and that, therefore, an inference of discrimination may be made. Id. at 147 & 179.[7] Viewing the foregoing in the light most favorable to Plaintiff, the court concludes that no reasonable jury could find that Plaintiff was treated differently than other employees, or that she was discriminated against because of her pregnancy.

[7] However, Plaintiff admitted that she "[couldn't] read [Brennan's] mind" and that no statements were made to her at any time during her employment that suggested that anyone had anything against women becoming pregnant, that pregnant women shouldn't work or that pregnant workers were unreliable. (Sacavage Dep. at 121-23 & 165.)

In conclusion, Plaintiff has presented no evidence that any other employee, similarly situated to Plaintiff other than in her pregnancy, received better treatment than Plaintiff. Plaintiff has not shown that Defendant's reason for terminating Plaintiff was a mere pretext for discrimination, unworthy of belief. Plaintiff has presented no evidence of discriminatory intent to overcome Defendant's asserted nondiscriminatory motive. Thus, "there is insufficient evidence of intentional discrimination and defendant is entitled to judgment as a matter of law." Stoll v. Missouri Osteopathic Found., 68 F.3d 479 (8th Cir. 1995) (available at No. 95-1562, 1995 WL 590443, at **2 (8th Cir. Oct. 6, 1995)) (per curiam) (holding that employee must submit evidence of pretext to avoid summary judgment). Plaintiff has failed to "demonstrate the existence of evidence of some additional facts that would allow a jury to find that the defendant's proffered reason is pretext and that the real reason for its action was intentional discrimination." Id. (citing Krenik v. County of Le Sueur, 47 F.3d 953, 958-59 (8th Cir. 1995)); Bodenheimer v. PPG Ind., Inc., 5 F.3d 955, 957 (5th Cir. 1993) (granting summary judgment for employer where employee failed to submit proof of discriminatory intent); see also Hicks, 509 U.S. at 516 (stating that "a reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false and that discrimination was the real reason"). Thus, the court will grant Defendant's motion for summary judgment.

IV. CONCLUSION

For the reasons set forth above, Defendant's motion for summary judgment will be granted.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUSAN L. SACAVAGE	:	CIVIL ACTION
	:	
v.	:	
	:	
JEFFERSON UNIVERSITY PHYSICIANS	:	NO. 99-3870

ORDER

AND NOW, TO WIT, this day of June, 2000, upon consideration of defendant Jefferson University Physicians' motion for summary judgment and plaintiff Susan L. Sacavage's response thereto, IT IS ORDERED that said motion is GRANTED. Judgment is entered in favor of defendant Jefferson University Physicians and against plaintiff Susan L. Sacavage on all counts.

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LOUIS C. BECHTLE, J.